

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1263

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee

v.

MICHAEL R. YODER,
Appellant

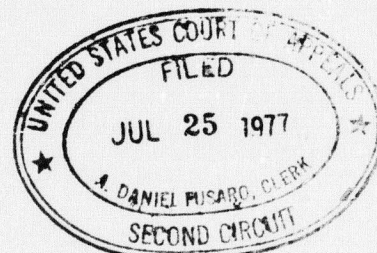
On Appeal from
The United States District Court
for the
Western District of New York

APPELLANT'S BRIEF & APPENDIX

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July 20, 1977



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QUESTIONS PRESENTED

1. Whether a suspect's *Miranda* rights are activated by a Special Agent of the FBI who reads these rights to the suspect when he might not be constitutionally compelled to do so.
2. Whether, having so advised a suspect of his *Miranda* rights, the FBI agent may seek a waiver of those rights in the face of an assertion of the right to an assigned attorney.
3. Whether the District Court erred in ruling as effective the waivers of rights executed by the appellant on November 11 and 18, 1976.
4. Whether the District Court erred in refusing to grant the appellant's motion to suppress.

PRELIMINARY STATEMENT

The appellant was indicted with three other individuals in the Western District of New York on November 17, 1976, for three counts of Bank Robbery, in violation of 18 U.S.C. §2113(a) and (b). Arraignment was begun on November 18, and completed on November 19, 1976, with the appearance of Mark J. Mahoney, assigned attorney, who appeared on behalf of the appellant throughout these proceedings.

Appellant and co-defendants moved for suppression of evidence of statements to the FBI, their conduct and other tangible property; a hearing was held on January 1, 7, 18, 19, 1977. Following oral argument on January 31, 1977, counsel was advised that the motions of appellant and co-defendant, Brian Buchanan, were denied, and that the motion of Daniel Yoder was granted. On March 28, 1977, appellant plead guilty to Count II of the indictment in violation of 18 U.S.C. §2113(a) while preserving the right to appeal the order denying appellant's motion to suppress.

On the same day, sentence was imposed of eight (8) years in the custody of the Attorney General under the provisions of 18 U.S.C. §5010(c), the Hon. John T. Elfvin, Judge Presiding. On May 19, 1977, appellant filed a notice of appeal from the decision and order denying appellant's motion to suppress, which decision and order was not filed until June 17, 1977.

STATEMENT OF FACTS

After entry through a hole cut in the roof of the Wyoming County Bank, in Strykersville, New York, and the morning arrival of bank employees, October 20, 1976, three disguised individuals did, without force or violence, escape with over \$16,000.00 in bank funds. Though agents of the Federal Bureau of Investigation (FBI) suspected Brian Buchanan, Daniel Yoder and his brother, 21-year-old Michael Yoder, these individuals were not located until after Brian Buchanan and Michael Yoder themselves contacted the FBI in the month following.

On November 11, 1976, the appellant, MICHAEL YODER, appeared at the FBI Headquarters, Buffalo, New York, pursuant to a phone call he had initiated to Special Agent (SA) Thomas Gray, of the FBI, two days previous (29, 294).¹ The appellant appeared voluntarily at the FBI and was not placed under arrest at that time, although there was sufficient evidence (31, 122, 286). Michael's purpose in surrendering to the FBI was to "get everything straightened out", but also to "be within the limits of my rights" (291, 298, 320).

At the appellant's arrival, SA Gray identified himself and SA John Poerstal to him and advised him of

¹Numbers in parentheses () refer to pages in the transcript of the suppression hearing conducted on January 3, 7, 18 and 19, 1977.

the purpose of the interview; he gave a detailed version of how the robbery had occurred and who had participated (30, 286).²

According to the procedure customary with the FBI in such circumstances (65), appellant was read, and himself read, an Interrogation, Advice of Rights ("Waiver") form (Gov. Ex. 7, A-18). This form states, in relevant part:

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in Court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

Immediately upon reading this, the appellant requested that an attorney be appointed for him (31, 109, 287, A-13).³

² SA Gray was not sure whether this occurred "at that point" (107).

³ This was the second such request in this case. Brian Buchanan, on November 3, also voluntarily appeared and, at a similar juncture in an interview with SA Gray, requested the assignment of counsel (69). At that time, SA Gray claims to have phoned an Assistant U.S. Attorney, and claims he was told that the suspect "was not entitled to an attorney unless he was formally charged with a federal crime;". This information was conveyed to Buchanan (77).

SA Gray responded that an attorney could not be appointed for the appellant until he "either made a statement or was formally charged with a crime" (287, A-16).⁴ Subsequent to this advice, the appellant signed the waiver portion of the form because "I figured it was the only way to get a lawyer" (288). He then made full inculpatory statements to SA Gray (289).

Although the appellant may, by this time, have been told that he was not under arrest, he does not recall being advised that he was free to leave (31, 304). He had been uncertain what would happen to him, and did not expect to be let go (290). Appellant refused to take the agents to where the remainder of his portion of the "loot" was hidden, but agreed to bring it himself and was released,

⁴This was the recollection of Michael Yoder at the time of his testimony and on the day following his arrest, November 19, 1976. SA Gray conceded that the appellant was advised that the laying of a formal charge was the basis for the assignment of counsel (110). The District Court concluded that the appellant's recollection concerning the balance of the advice given was not credible, claiming that:

(t)he testimony of the two agents is clearly and firmly to the contrary and Michael Yoder is totally silent concerning any effort or request by him towards securing appointment of counsel after he had finished giving his statement.

However, of the two agents present on November 11, only SA Gray testified at the suppression hearing; though his testimony does not go so far as the appellant's, it is not "clearly and firmly to the contrary". Additionally the record does reflect another request by the appellant for the assignment of counsel (290), and also at arraignment (A-1).

after again asking about an attorney (35, 290).

The appellant, indicted on November 17, 1976, voluntarily surrendered to the FBI the next day (45, 285). Again, he signed a waiver of rights and was questioned (139). He was advised that it would be "better" for him with his cooperation (293-294). He agreed to take the agents to where his "loot" was hidden, following the arraignment, at which he understood counsel would be assigned (292, 321). Shortly thereafter, he was arraigned by the U.S. Magistrate and released on a \$5,000.00 personal recognizance bond (47).

Without any additional waiver of rights or any efforts by the FBI to contact the attorney assigned by the Magistrate, appellant was then taken by the FBI agents to where he had hidden his "loot" (121, 152, 174, 175, 200). The appellant first appeared with his assigned attorney on the following day, November 19th (320).

More to the point, Brian Buchanan, on November 4, the day following his inculpatory statement to SA Gray, and two weeks prior to being formally charged, was assigned counsel by Hon. Edmund F. Maxwell, United States Magistrate, at the instigation of the FBI and the U.S. Attorney's office (84; A-3, 7, N. 2).

Seen in light of the facts, first of all, the advice which the appellant recalls receiving was closer to being accurate than the advice attributed to the U.S. Attorney. Second, Michael's recollection that this advice was given is really more than credible.

It is most likely that, when Michael requested an attorney, reference would have been made to the manner by which Brian Buchanan had already obtained counsel. To find otherwise requires us to believe that SA Gray knowingly gave the appellant advice which the experience with Brian Buchanan proved to be incomplete and erroneous: formal charge was not a condition precedent, and the making of a statement was sufficient, in practice, for the appointment of counsel.

SUMMARY OF ARGUMENT

Having advised the appellant of his *Miranda* rights, those rights became activated, the fact that the FBI agents may not have been constitutionally compelled to so advise him notwithstanding.

Upon assertion by appellant of his right to an assigned counsel, the agents were bound to cease interrogation until counsel was supplied; they were barred from seeking a waiver of the right asserted. Thus, the waivers obtained following the assertion of the right to counsel were ineffective, and for the additional reasons that the waivers were not knowingly, intelligently and voluntarily executed.

The statements of the appellant, the evidence of his conduct, and the tangible evidence obtained pursuant to the waivers and interrogation of the appellant should have been ordered suppressed.

POINT I

THE APPELLANT HAD THE
PROTECTION OF ALL THE
RIGHTS READ TO HIM.

- A. The appellant's Fifth and Sixth Amendment rights were activated by being read to him.

The law enforcement officer has been entrusted with the prime responsibility for the timely dispensing of constitutional rights to citizens confronted with the threat of criminal prosecution. *Miranda v. Arizona*, 384 U.S. 486 (1966). One suspected of criminal activity is required to be advised of his rights whenever one's "freedom of action is curtailed in any significant way," 384 U.S. at 467; this calls for judgment on the part of the officer.

If the officer fails to advise a suspect of his rights in a setting which falls within the above description, then the evidence which he obtains through interrogation of the suspect will be excluded from use as evidence at trial for his failure to do what the Constitution requires. But if, whether out of an abundance of caution or an accurate judgment of circumstances, which might not be reproducible in a courtroom, he concludes that the suspect ought to be advised of his rights, and though others do not agree with his judgment, this perhaps liberal dispensing of rights to citizens cannot fairly be criticized or reviewed.

But, in any event, it can hardly be said that it was *improper* in this case for SA Gray to have advised the appellant of his rights, on November 11, 1976. The investigation had not merely "focused on" the appellant, it had stopped with him. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda, supra*; *Hamilton v. Alabama*, 368 U.S. 52 (1961).

Moreover, the decision to advise the appellant of his rights was in accordance with the guidelines which appear to be in effect for the FBI, which calls for advising "suspects and other persons under arrest" of their rights -- a category of persons manifestly broader than the class of persons to whom the *Miranda* rights are required to be read. 384 U.S. at 483-484. The Supreme Court indicated that such practice, which included cessation of interviews upon assertion of the right to counsel, could "readily be emulated by state and local enforcement agencies." 384 U.S. at 486.⁵

Having adopted such procedures in light of the requirements of the Constitution, even though they go beyond what is mandatory under the Constitution, the FBI is bound to follow them. *United States v. Leahey*, 434 F.2d 7 (1st Cir.1970); *United States v. Sourpas*,

⁵The District Court denied counsel's request at the suppression hearing for discovery of the FBI regulations now in effect concerning interrogation of suspects, as not being pertinent (125, 179-182).

515 F.2d 295 (9th Cir.1975); *United States v. Jacobs*, 547 F.2d 772 (2d Cir.1976); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). *A fortiori*, having followed these procedures, the FBI is, naturally, bound by their consequences.

That is, FBI agents having told the appellant on November 11, 1976, that if he could not "afford a lawyer one would be appointed for you before any questioning if you wish," the Government cannot now be heard to claim that that was not so, without a denial of the Due Process rights of the appellant. *Raley v. State of Ohio*, 360 U.S. 423 (1959); this is true even were the advice erroneous, and no reliance on the advice was claimed, 360 U.S. at 439, not the case with appellant.

The Government's agents in the FBI rely on the delivery of *Miranda* warnings to insure themselves against suppression of evidence, which may have been obtained by questionable practices, upon claims of involuntariness or insufficient waiver of rights. See, e.g., *Beckwith v. United States*, ___ U.S. ___, 96 S.Ct. 1612, at 1617 (Mr. Justice Marshall, concurring in the judgment). Obversely, Michael Yoder relied on the Government, generally, to allow him to get everything straightened out "but within the limits of my

rights," and in particular he relied on the assertion that he did have, to the extent possible, the rights specifically enumerated to him (291, 298, 320).

The Government is estopped to retract that which they have given. *City of Sheridan v. Montana-Dakota Utilities Co.*, 157 F.Supp. 664 (D.C.Wyo. 1958); *Stockstrom v. C.I.R.*, 190 F.2d 283 (D.C.Cir. 1951); *United States v. Fox Lake State Bank*, 366 F.2d 963 (7th Cir. 1966); *United States v. New Orleans Chapter, Assoc. Gen. Con. of Am.*, 238 F.Supp. 273 (E.D.La. 1964); *People v. Donovan*, 279 N.Y.S.2d 404 (Court of Special Sessions, 1967).

It must be concluded that the reading of the *Miranda* rights to the appellant, on November 11, 1976, activated those rights to the extent and with the same effect as if such reading was clearly commanded by the *Miranda* decision itself. This would insure, in addition, the uniformity of practice upon which due process and equal protection of the law is founded. *United States v. Jacobs, supra*.

- B. The appellant having asserted his right to an attorney, the questioning should have ceased, and not resumed without the presence of an attorney representing the suspect.

The appellant asserted his right to an attorney as soon as he was advised of this right; in addition, he asserted his inability to afford adequate representation.

The United States Supreme Court, in *Miranda* established a *per se* prohibition against further interrogation of a suspect where the reading of warnings to him is followed by the assertion of the right to counsel:

The Court [in *Miranda*] showed in the very next paragraph, moreover, that when it wanted to create a *per se* rule against further interrogation after assertion of a right, it knew how to do so. The Court there said 'if the individual states that he wants an attorney, the interrogation must cease until an attorney is present' [*Michigan v. Mosley*, ___ U.S. ___, 96 S.Ct. 321, 329 (1975) (Mr. Justice White, concurring, citing 384 U.S. at 474; see especially footnote 2 in Justice White's concurring opinion)].

When the FBI agents concluded, whether correctly or incorrectly, that they would not be able to supply counsel to the appellant at that time pursuant to his request, and that counsel would not be available until he appeared in Court, no violation of the appellant's rights could be found "so long as they do not question him during that time." 384 U.S. at 474. But the further interrogation of the appellant in this case was in violation of his Fifth and Sixth Amendment rights. *United States v. Priest*, 409 F.2d 491 (5th Cir. 1969); *United States v. Crisp*, 435 F.2d 354 (7th Cir. 1970); *United States ex rel. Williams v. Twomey*, 467 F.2d 1248, 1252 (7th Cir. 1972); *United States v. Flories-*

Calvillo, ____ F.2d ____, 19 Cr.L.R. 2405 (9th Cir.
1976); *United States v. Jakakis*, 423 F.Supp. 564
(E.D.N.Y. 1976); *United States v. Kinsman*, 540 F.2d
1017 (9th Cir. 1976).

POINT II

THE WAIVER OF RIGHTS,
EXECUTED ON NOVEMBER 11,
1976, WAS NOT EFFECTIVE.

A. The Government was precluded from seeking the waiver.

In the face of the assertion by the appellant of his right to counsel, SA Gray was not permitted to seek its retraction *Miranda v. Arizona, supra; Michigan v. Mosley, supra* (Mr. Justice White, concurring, at 96 S.Ct. 228); *United States v. Crisp, United States v. Priest, United States v. Flories-Calvillo, United States ex rel. Williams v. Twomey, United States v. Jakakis, Kinsman, supra.*

B. In any event, the waiver was not knowingly, voluntarily and intelligently executed.

A heavy burden rests upon the Government to demonstrate that the appellant knowingly, intelligently and voluntarily waived his privilege against self-incrimination and his right to assigned counsel. *Johnson v. Zerbst, 304 U.S. 458 (1938); Escobedo v. Illinois, supra, at 490; Miranda v. Arizona, supra, at 474.* Where the warnings enumerated in *Miranda* have been administered, the Government must show, under all the facts, that the accused has thereby waived effectuation of these rights. *Holloway v. United States, 495 F.2d 835, 837 (10th Cir. 1974).*

1. The advice given the appellant in inducing his waiver was incorrect as a matter of law. Counsel could have been appointed for appellant as soon as the warnings had been given without the formal charge or confession which SA Gray told the appellant were necessary.

Counsel may be assigned when required by the Sixth Amendment, 18 U.S.C. §3006A(a)(4). Having been read the *Miranda* warnings, the appellant's Sixth Amendment right to assigned counsel was activated (Point I, *supra*).

Additionally, it appears that an attorney, engaged by a suspect who was unable to afford his services can be assigned by the Court retroactively and be compensated "as the interests of justice may dictate." 18 U.S.C. §3006A(c). (18 U.S.C. §3006A(a-c) is set forth in the Appendix at A-19). *Plan for the United States District Court for the Western District of New York Pursuant to the Criminal Justice Act of 1964* (approved, February 10, 1971) provides that such compensation may cover "services rendered during the arrest period." (Title II, Subtitle B, A-20).

It would be anomalous indeed if the U.S. Magistrate could assign counsel retroactively with regard to the "arrest period," but not directly. C.f. *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963). The *Guidelines for*

Administration of the Criminal Justice Act of 1964 ("Guidelines"), approved by the Judicial Conference of the United States demonstrate that the authority to appoint counsel is broader than a strict reading of 18 U.S.C. §3006A would suggest. The *Guidelines* allow for the appointment of counsel "under the general terms of the Act" in cases not specifically set forth in the act. Those instances "include but are not limited to":

(1) Appointment of counsel for a Grand Jury witness facing loss of liberty, and for

(2) Persons in a "pre-trial diversion" program. (*Guidelines*, Chapter 2, §2.01-D, A-21).

The non-exclusive terms of the *Guidelines* allow for discretion on the part of the Magistrate, and it cannot be credibly claimed that a prime suspect, having asserted the right to counsel following proper warnings, may not be assigned counsel before being charged with, or making a complete confession to, a crime, especially where a Grand Jury witness might, as described above, receive such counsel.

Congressional policy is not to the contrary. Rule 39 of the *First Preliminary Draft* (7th Committee Draft) of the Federal Rules of Criminal Procedure, the predecessor to Rule 44 F.R.Cr.P., stated:

Assignment of counsel shall be made as long before arraignment as practicable.

The rejection of this language in the final draft was less out of disagreement with the principle stated, than with the perceived difficulty in administration of such a rule. C.f. Orfield, *Criminal Procedure under the Federal Rule* (1967), §44:1.

Thus, it is not true as a matter of law that either a formal charge, as believed by the District Court, or the signing of a confession are necessary to the appointment of counsel, though this is what the appellant was advised.

2. *The advice to Michael Yoder in inducing his waiver was incorrect as a matter of fact.* Being formally charged with a federal crime is not in practice a condition precedent to the appointment of counsel. Brian Buchanan had been assigned counsel well before indictment (see footnote 4, *ante*). What *did* precede the instigation by the FBI of the appointment of an attorney for Brian Buchanan was that defendant's signing of a confession. Though this may reflect the practice of the local office of the FBI in determining when to assist a suspect in obtaining counsel, this advice was inaccurate to the extent that it was a representation to the appellant of the practice before the learned U.S. Magistrate for the Western District of New York.

3. *The legal and factual inaccuracy of the advice bar a finding that the waiver was knowing,*

intelligent or voluntary. It is not claimed that the warnings themselves were improper or merely internally inconsistent. E.g., *United States v. Olivares-Vega*, 495 F.2d 827 (2d Cir. 1974), where the appellant argued that the warnings "could have mislead him," at 828. Nor does this case turn on the semantic interpretation of the import of the rights given, i.e. whether they make clear to the suspect that he has the right to the presence of counsel while being questioned. Compare the Second Circuit cases cited in *Olivares-Vega*, *supra*, with the cases cited in the footnotes to that opinion.

The division among the Circuit and State Courts to which this Court made reference in *Olivares-Vega*, at 829, seems to turn on determinations that in a particular case there is an absence of language which the defendant can comprehend and on which he can knowingly act, or actual lack of understanding by defendant of his rights. *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir. 1967). In *United States ex rel. Williams v. Twomey*, *supra*, the petitioner, Williams, following at least three sessions in which he was advised of rights in a format which was in question in that case, when asked if he then wished assigned counsel responded "Yes, I want a lawyer. . . If it's possible that I can have one." 467 F.2d at 1252. The Seventh Circuit Court of Appeals there held that the warning given in

that case was not an "effective and express explanation," but equivocal and ambiguous.⁶

But in none of the cases cited in *Olivares-Vega*, *supra*, is the advice itself found to be inaccurate, as a matter of law, as is claimed by this appellant.⁷ These cases were concerned with confusion in the minds of the suspect about his right to the presence of an attorney during questioning, arising out of the language of the warning itself.

By contrast, in this case, though the *Miranda* warnings administered were correct in form, the subsequent advice in pursuit of a waiver, was incorrect. By saying that the right to assigned counsel would not attach until a subsequent stage of the prosecution, the FBI is actually attempting to retract the earlier advice given, that the appellant had a right to counsel.

4. The advice to appellant was in the course of a denial of his rights to equal protection and due process of law. The only perceptible difference between the position of Michael Yoder on November 11, who was told that counsel could not yet be assigned for him,

⁶ The assertion by the petitioner, Williams, of his right to an attorney, however tentative, is another factor which distinguishes this case from the Second Circuit cases cited in *Olivares-Vega*, *supra*.

⁷ Except, see *United States v. Garcia*, 431 F.2d 134 (9th Cir. 1970).

and Brian Buchanan, who already had an assigned attorney due to the affirmative action of the FBI, was that Buchanan had confessed, Yoder had not. Otherwise, the status of both suspects was identical. In light of the affirmative provision of counsel to Brian Buchanan, the failure to provide counsel to Michael Yoder was a deliberate denial of the equal protection and due process rights of the appellant, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

This disparate treatment at the hands of the FBI was no less violative of the appellant's right where the denial of counsel, for all that appears, was part of a design to first obtain a confession from him. The Government cannot constitutionally compel or attempt to induce an individual to waive one fundamental right (the privilege against self-incrimination) in order to obtain implementation of another (the right to counsel). C.f. *Simmons v. United States*, 390 U.S. 389, 394 (1968).

Given the nature of the advice to the appellant following his assertion of the right to counsel, the waiver which he executed on November 11, 1976, cannot be considered as knowing, intelligent or voluntary.

The strict Court, in rejecting the appellant's

argument, made reference to the fact that the appellant may have been free to leave the FBI office.⁸ Were the appellant not read his rights, this would be pertinent to a finding of the propriety of such omission. *Oregon v. Mathiason*, ___ U.S. ___, 97 S.Ct. 711 (1977).

But even if the appellant did believe that he was free to go, which he did not, such a fact should have little bearing on the clear obligation of the Government to one who, albeit voluntarily, wishes to confess wrongdoing "within the limits of one's rights."

The District Court fairly suggests that the appellant *should* have left the FBI office on November 11, or "remained silent and uncooperative" or else deserved to lose the rights he was seeking (A-9). Though it may be clear to us, the appellant was in no position to doubt the FBI and relied on their claim that he was being given all his rights. Though mistaken, he should not be disadvantaged by his trust.

Even if the appellant would have been eager to confess after being advised by an attorney not to, a lawyer could at least attempt to insure that he does not thereby "utterly destroy his bargaining position." *United States v. Satterfield*, 417 F.Supp. at 297.

⁸The District Court in its opinion undertakes to characterize several of the appellant's arguments below, to which characterizations the appellant does not subscribe.

To take all advantage and position from the appellant merely because he did not grasp desperately at every means of avoiding prosecution is to take a cynical view of the purpose of the constitutional protections involved and to apply as an operant principle, against this appellant, "never give a sucker an even break."

POINT III

THE WAIVER OF RIGHTS,
EXECUTED ON NOVEMBER 18,
1976, WAS NOT EFFECTIVE.

On November 18, 1976, Michael Yoder was, by all that appears in the record, of the same understanding of his rights or lack of rights as he was on November 11, 1976. Thus, for all the considerations which rendered his prior waiver of rights, ineffective, Point II, ante, the subsequent, November 18th, waiver must also be considered ineffective. Additionally, the waiver on November 18th was really the product of those prior conditions and violations of the appellant's rights complained of above. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Also, the prior assertion of the right to counsel, on November 11, must be held to apply at the time of the appellant's arrest to bar the FBI from seeking a waiver of the rights of which he was advised. If the Government does argue that the right to counsel did not attach until the appellant was formally charged, than that time had arrived on November 18th and the Government cannot so posture itself as to claim ignorance concerning or ineffectiveness of the prior request for counsel and abandon its promise to recognize the right

to counsel after the appellant was formally charged.⁹

Following indictment, the right to counsel can only be waived "after such warnings and explanations as would justify a court in permitting a defendant to proceed *pro se* at trial." *United States v. Satterfield*, 417 F.Supp. 293 (S.D.N.Y. 1976) *aff'd*, ___ F.2d ___, (No. 309, December 7, 1976); c.f. *Faretta v. California*, 422 U.S. 806 (1975). *Satterfield*, a case freely, if not inappropriately, relied on by the District Court, is very similar to the instant case. A post-indictment statement in that case was excluded where it was seen as the product of events which indicated confusion on the part of the suspect of the import of his rights. The District Court failed to apply to all the facts and circumstances in appellant's case the high standard for a waiver declared in *Satterfield*. But a knowing, intelligent and voluntary waiver of the appellant's rights could hardly be found by any standard given the circumstances of the entire case as outlined above.

The waiver on the 18th of November was also given under advice that it would go better for the appellant if he cooperated, in reference to the return of the proceeds of the bank robbery. Thus, it cannot

⁹The District Court ascribed certain arguments to the Government, e.g. "the Government's position is twofold." (A-11). This is an apparent oversight since the Government neither answered the appellant's motions nor appeared at oral argument (See transcript of oral argument, Record Index No. 13).

be said that the waiver and subsequent information obtained from the appellant was obtained without any "direct or implied promises, however slight, nor by the exertion of any improper influence." *Bram v. United States*, 168 U.S. 532 (1897); *Malloy v. Hogan*, 378 U.S. 3, 7 (1964).

Following arraignment on the indictment, the burden on the Government to show waiver of the appellant's rights can only be greater. But no waiver was executed following the arraignment, and no effort was made to contact the attorney who was assigned by the United States Magistrate during or following the arraignment. Whether the failure to contact the attorney, standing alone, would be sufficient to require exclusion of the evidence obtained, [c.f. *United States v. Massullo*, 489 F.2d 217 (2d Cir. 1973)] need not be the deciding issue in this case where the evidence obtained at this stage can fairly be described only as the product of the same misunderstanding inculcated in the appellant throughout the prior proceedings.

CONCLUSION

The appellant received the full protection of the *Miranda* rights when they were read to him. At his assertion of the right to counsel all questioning should have ceased. The agents of the FBI should not have sought any waiver of his rights, either on November 11 or November 18, 1976; these waivers were nevertheless ineffective because they were not knowingly, intelligently or voluntarily executed, and they were obtained in violation of the defendant's rights to the equal protection and due process of law.

Thus, the statements of the appellant, the evidence of his conduct, and the tangible property seized were obtained in violation of the appellant's Fifth, Sixth and Fourteenth Amendment rights.

The judgment of conviction in the District Court for the Western District of New York must be set aside and the order of the District Court denying the appellant's motion for suppression of evidence be reversed, and the evidence described be suppressed from use as evidence against the appellant at trial.

Respectfully submitted,

DOYLE, DIEBOLD, BERMINGHAM,
GORMAN & BROWN
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MARK J. MAHONEY, Esq., Of Counsel
SHERYL REICH, on the Brief

APPENDIX

Pages

APPENDIX

Relevant Docket Entries.	.A- 1
District Court Memorandum & Order.	2
Affidavit of Michael Yoder	15
Interrogation; Advice of Rights (Gov.Ex. 7).	18
18 U.S.C. §3006A	19
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RELEVANT DOCKET ENTRIES

<u>Date</u>	
11/17/76	Filed Indictment.
11/17/76	Issued warrant.
11/18/76	P.B.M. - Defendant in person, request assignment of counsel; Adj. 11/19/76 for arraignment. Defendant released on \$5,000 recognizance bond.
11/19/76	P.B.M. - Defendant pled not guilty; Discovery schedule set and motions are returnable 12/6/76; Bail continued.
11/22/76	Filed Cy. 5 of CJA-20 - Order appointing Mark Mahoney, as counsel - MAXWELL, Mag.
01/03/77	Suppression hearing. Hearing adj. to 1/5/77.
01/07/77	Filed deft's notice of motion for an order compelling the suppression from the use at trial.
01/07/77	Hearing resumed from 1/3/77; Court adjourns hearing to 1/18/77 for any defense witnesses and/or argument.
01/18/77	Hearing on suppression of statements and evidence resumed from 1/7/77; Hearing adj. 1/19/77.
01/19/77	Hearing continued from 1/18/77 ends. Defts. to file and serve memo not later than 1/26/77; Govt. to file & serve reply by 1/28/77; Oral argument at 2:00 p.m. on 1/31/77. Court ajs. trial date to 2/8/77.
01/31/77	Court notes non-appearance by the Government, and rules that the Government is in default for not making its position known by brief or oral argument as to the suppression hearing. Court then hears oral argument by Attorney for the defendant on motion to suppress. Decision reserved.
02/03/77	Court advises counsel that the Court denies motion to suppress for deft. and also for Co-deft. Brian Buchanan, but grants motion

RELEVANT DOCKET ENTRIES
(cont.)

02/03/77 to suppress as to Co-deft. Daniel Yoder. The Government advises the Court that an appeal will be filed re: Co-deft. Daniel Yoder. The Court thereafter considers plea agreements by deft. and Co-deft. Brian Buchanan, both defts. agree to execute consents for presentence reports, the Court then set time for consideration of plea and sentence on 3/14/77.

03/28/77 Court accepted plea of guilty to count two, then sentenced deft. to the custody of the attorney general for a period of eight years under the provisions of title 18, section 5010(c). Court permitted deft. to remain out of custody until notified by marshal's office where to report and court directed filing of affidavit by Jonathan E. Pickering. Court noted that deft. has preserved his right to appeal decision on suppression hearing. ELFVIN, J.

04/27/77 Filed cert. copy of J&C Order return: Defendant surrendered 4/19/77 to Federal Correctional Institution at Petersburg, Va.

05/19/77 Filed defense Notice of Appeal dtd 4/21/77.

06/20/77 Filed Memorandum & Ord. dtd 6/17/77: deny his motion to suppress post-indictment & post-arrest statements; question whether the order denying suppression was an appealable order are matters for resolution by the U. S. Court of Appeals for this Circuit. ELFVIN, J.

DISTRICT COURT'S MEMORANDUM & ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

-vs.-

BRIAN BUCHANAN, DANIEL YODER
and MICHAEL YODER,

Defendants.

Cr. 76-174

MEMORANDUM

and

ORDER

Brian Buchanan, Daniel Yoder and Michael Yoder, defendants herein, sought suppression of evidence as to certain written and oral statements by them to agents of the Federal Bureau of Investigation ("FBI") and as to physical evidence -- i.e., recovered portions of the proceeds of an alleged bank robbery. The chronology of the events was developed in a pre-trial suppression hearing held January 3, 7, 10 and 12, 1977.

On or about October 25, 1976 Buchanan while in Florida learned that FBI agents were inquiring about him in connection with an October 20, 1976 robbery of the Strykersville branch of the Wyoming County Bank. Believing that there was a warrant outstanding for his arrest, Buchanan returned to Buffalo and telephoned Special Agent Thomas Gray of the FBI November 2nd. An appointment was made for Buchanan to come into the FBI office the following day to talk to Gray.

The following morning Buchanan appeared at the FBI office with his fiancée, Nancy Tesch, who by that date had

DISTRICT COURT'S MEMORANDUM & ORDER

already been scheduled to testify before the Federal Grand Jury. Buchanan was taken to an interview room by Gray where Gray and Special Agent Neil Heiner conducted an interview. Buchanan was informed that the interview pertained to the bank robbery and was then read an FBI "Interrogation: Advice of Rights" form which contained his "Miranda rights". Buchanan then was handed the form and appeared to read it. He was asked if he understood his rights and replied in the affirmative; he then signed the form. Believing that he had a right to the appointment of an attorney, Buchanan requested that one be appointed. Gray left the interview room and telephoned an Assistant United States Attorney with respect to such appointment. Gray, on returning, advised Buchanan that he was not entitled to a court-appointed attorney at that time because he was not "formally charged with a crime". He was told that, because there was no warrant for his arrest, he could leave or could remain and answer such questions as he chose to answer. Buchanan chose to remain, answered the agents' oral questions and subsequently signed a typewritten statement prepared by the agents. Thereafter, Gray inquired about the location of the money taken in the bank robbery. Buchanan, later on that same day, led FBI agents to his secreted share of the stolen money. Buchanan then went home. The following day Buchanan went voluntarily and without appointment to the United States Attorney's

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Office and spoke with another Assistant United States Attorney with regard to the appointment of an attorney and was referred to the United States Magistrate who, later on that day, appointed an attorney for him. The indictment was not returned against Buchanan and the others until November 17th. Buchanan was arrested November 22nd and no post-indictment or post-arrest statements by Buchanan are sought to be suppressed.

On or about November 7, 1976, Michael Yoder telephoned the Buffalo Office of the FBI and spoke with Gray. Gray told Michael Yoder that he had been looking for him. Gray, however, also informed Michael Yoder that there was no warrant for his arrest and that he didn't have to come in. Michael Yoder, nevertheless, voluntarily came to the FBI office on November 11th and was interviewed. Special Agent Poerstal and Gray were present. Michael Yoder was advised that the purpose of the interview was to discuss the bank robbery. Michael Yoder had read to him and himself read the "Interrogation: Advice of Rights" form. Michael Yoder then requested that an attorney be appointed. Gray told him that an attorney could not be appointed until he had been formally charged. It is alleged that Michael Yoder understood that, if he made a statement relating to the bank robbery, an attorney would be appointed. Michael Yoder then signed the rights form. Michael Yoder alleged that, while he was aware

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that he was not under arrest and was free to leave, he wanted to give a statement so that an attorney would be appointed. Michael Yoder proceeded to give an oral statement as to how the robbery occurred which statement then was typed, reviewed by Michael Yoder and signed. Michael Yoder at that time gave another shorter statement which was taken down in longhand by Gray and signed by Michael Yoder. This statement identified Buchanan as one of the two other men who had participated with Michael Yoder in the bank robbery. As for the robbery proceeds, Michael Yoder promised to bring what was left of his share to the FBI office the next day, November 12th, but did not. Michael Yoder left after the interview. On November 18th, the day after the indictment came down against Michael Yoder, he again voluntarily appeared at the FBI office and was placed under arrest. He was again advised of his rights and again he read and signed the advice and waiver form. Michael Yoder was asked by Gray about the location of the robbery proceeds and then agreed that he would produce the same after he had been brought before the Magistrate. Less than an hour and a half after being arrested, Michael Yoder appeared before the Magistrate and was allowed to go free after executing a \$5,000 personal recognizance bond. The arraignment on the indictment, however, was not completed until the following day, when the appointed counsel appeared. After bail had been set, Michael

DISTRICT COURT'S MEMORANDUM & ORDER

Yoder directed Heiner to the place where the balance of his share of the money was located.

Daniel Yoder had no pre-indictment or pre-arrest contact with Government agents. He was arrested on November 18th at his apartment where no questions, except concerning his identity, were asked. Daniel Yoder was removed to the FBI agents' automobile where he was advised of his Miranda rights. Although Daniel Yoder indicated that he understood his rights, he would not sign the advice and waiver form. While being transported to Buffalo, Daniel Yoder requested an attorney. Upon arrival at the FBI office, Daniel Yoder was permitted to call his father and he testified at the hearing that his father had advised him not to answer any questions until he had spoken with an attorney. Daniel Yoder was then interviewed by Gray and Heiner. An advice and waiver form was again read to him by Gray and Daniel Yoder was given the form, read it and acknowledged that he understood it, but again refused to sign. Both Gray and Daniel Yoder testified that Daniel Yoder then requested an attorney. Daniel Yoder was told that an attorney would be appointed when he was brought before the Magistrate. Gray testified that Daniel Yoder then, after being advised that he need not talk, confessed to his participation in the bank robbery and agreed to show the location of what remained of his share of the bank robbery. No written confession or

DISTRICT COURT'S MEMORANDUM & ORDER

transcript of oral confession was prepared. Daniel Yoder testified that he only made such statement because the agents told him that such would help him stay out of jail. Daniel Yoder was taken before the Magistrate who set bail at \$5,000 personal recognizance bond and informed the defendant that an attorney would be appointed the next day. Upon leaving the Magistrate's Court, Daniel Yoder directed Gray to the place where the money was secreted.

This decision turns on a proper interpretation and application of Miranda v. Arizona, 384 U.S. 436 (1966), and Massiah v. United States, 377 U.S. 201 (1964), during a period of review and, in the view of some, retrenchment of these decisions by the United States Supreme Court. After the hearing on the suppression motion had been completed, the United States Supreme Court rendered its per curiam decision in Oregon v. Mathiason, _____ U.S. _____, 45 U.S.L.W. 3505 (January 25, 1977) specifying the non-application of Miranda where a suspect voluntarily appears at a police station and discusses, in a non-custodial but coercive ambience, a criminal activity. In Brewer v. Williams, 45 U.S.L.W. 4287, 4331 (March 23, 1977), the United States Supreme Court held unusable an arrested suspect's confessional words and actions because had been deprived of counsel.

DISTRICT COURT'S MEMORANDUM & ORDER

Pre-Indictment Statements of
Brian Buchanan and Michael Yoder

Both Buchanan and Michael Yoder voluntarily contacted the FBI prior to their indictment and, while not under arrest, both answered questions about the bank robbery and gave statements indicating their involvement. If this was all, the recent U.S. Supreme Court decision in Oregon v. Mathiason would settle the matter.¹ The facts in both Buchanan's and Michael Yoder's situations differ from that in Mathiason, in that both were given the so called "Miranda warnings" and both requested the appointment of an attorney prior to questioning. Both were denied such appointment until they had been "formally charged with the crime."² They then signed the advice and waiver forms prior to making

¹ There is no testimony which would show that, although not under arrest, they were in custody. In Buchanan's case, it is not contradicted that he was specifically informed that he could leave or remain and answer questions. In Michael Yoder's case, he was aware that he could leave and was not under arrest but gave a statement when advised that an attorney could not be appointed until and unless he had been formally charged.

² This clearly was Buchanan's understanding at the time he gave his statement although, in fact, he was successful on the following day in having an attorney appointed well in advance of the perfering of formal charges. Michael Yoder, in his testimony, said that he was told that he could not have an attorney appointed until either he had been formally charged or had given an inculpatory statement. I find this version not credible; the testimony of the two agents is clearly and firmly to the contrary and Michael Yoder is totally silent concerning any effort or request by him towards securing appointed counsel after he had finished giving his statement.

DISTRICT COURT'S MEMORANDUM & ORDER

statements. Nevertheless, I do not find the facts so distinguishable as to permit me to reach the result of suppressing the pre-indictment statements.

These defendants' position includes the argument that they were compelled to abandon their Fifth Amendment right of silence and to give statements and cooperate with the Government because they then had no right to an assigned attorney. This presupposes that these defendants were required to make a decision. There was no indication made or given to these defendants that they would have been arrested or their liberty curtailed in any manner merely because they had remained silent and uncooperative. They were properly advised on the requirements for the appointment of an attorney. The Criminal Justice Act of 1964, as amended in 1970, (18 U.S.C. §3006A) reads in pertinent part:

"(a) Choice of plan -- Each United States District Court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor ***, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, *** or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel.***"

Subsection (4) was inserted to give the act flexibility in an area of constitutional law ever changing by judicial decisions. Presently, the Sixth Amendment right to counsel

DISTRICT COURT'S MEMORANDUM & ORDER

attaches only "*** at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972). Apparently, there is no authority under the Criminal Justice Act for the appointment unless they were arrested or formal charges were brought. I, therefore, find that the advice to the defendants was not erroneous.

These defendants also contend that, irrespective of the Supreme Court's decision in Mathiason, once an individual has indicated his desire to consult with counsel any further interrogation prior to such consultation is improper. In the light of their signing the advice and waiver forms, I find this argument inappropriate in the fact situations before me.

Therefore, I deny the motions of defendants Brian Buchanan and Michael Yoder to suppress their pre-indictment statements.

Post-Indictment Statements of
Michael Yoder and Daniel Yoder

Any decision as to post-indictment statements must turn on a proper application of Massiah v. United States, 377 U.S. 201 (1964). As in United States v. Satterfield, ____ F.2d ____ (2d Cir. Slip Opinion, Docket No. 309, December 7, 1976) affirming the District Court's decision at 417 F.Supp.

DISTRICT COURT'S MEMORANDUM & ORDER

293 (S.D.N.Y. 1976), the Government's position is twofold. First, Massiah is distinguishable because of the lack of surreptitious activity in this case. Second, it is contended that there has been a waiver of the right to counsel after "Miranda warnings".

As to the first argument, I agree with the district court decision in Satterfield (supra, at 295) that as to indicted suspects Massiah applies whether or not there was deceit.

As to the second argument, I find that Satterfield as affirmed is controlling and requires the suppression of Daniel Yoder's statements but not those of Michael Yoder.

For the waiver of the Sixth Amendment right to counsel the following standard has been set by the United States Supreme Court in Johnson v. Zerbst, 304 U.S. 458 (1938): "A waiver is ordinarily an intentional relinquishment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (Id., at 464.) There is a higher standard for a waiver of counsel after the Sixth Amendment has attached. United States v. Satterfield, supra, at 303. Applying such a test I do not find that the Government has met its burden to show that the statements of

DISTRICT COURT'S MEMORANDUM & ORDER

Daniel Yoder were voluntary. Lago v. Twomey, 404 U.S. 477, 489 (1972). Daniel Yoder repeatedly after his arrest indicated his desire to have an attorney appointed. Twice he refused to sign the advice and waiver form. There is no written or transcribed statement by Daniel Yoder, either signed or unsigned. There is no express waiver as in United States v. Duvall, 537 F.2d 15 (2d Cir.), cert. denied, _____ U.S. _____, 96 S.Ct. 3173 (1976). Finally, the Government has failed to show that the statements by Daniel Yoder were the result of inquiry initiated by Daniel Yoder and not by the Government. See, for example, United States v. Gaynor, 472 F.2d 899 (2d Cir. 1973).

Upon the above findings, I find that all of Daniel Yoder's statements, including any such and any actions leading to recovery of his share of the proceeds should be and hereby are suppressed.

As to the post-indictment and post-arrest statements of Michael Yoder, I find that the statements as to the location of the robbery proceeds were voluntary and that the signing of the advice and waiver form meets the requirements for a waiver of the right to counsel under the Sixth Amendment. I hereby deny his motion to suppress such statements.

The foregoing orders were noted by me on the record in open court February 3, 1977 but the underlying findings of fact and conclusions were not set forth there or in any

DISTRICT COURT'S MEMORANDUM & ORDER

filed written document. Subsequently, the Government moved for reargument or reconsideration or a stating of the underlying findings as to the suppression of Daniel Yoder's statements. I do not desire or need further oral argument and I have given the matter of such suppression further consideration but have concluded that my original result was sound. Consequently, the Government's motion for reargument hereby is denied, its motion for reconsideration has been granted and fulfilled as has its motion for the requisite findings.

Some further comment is appropriate re Michael Yoder. Following my denial of his motion to suppress evidence, he pleaded guilty pursuant to a plea agreement, accepted by me, wherein inter alia his right to appeal from such denial was to be preserved. He was sentenced March 13, 1977, the judgment was filed March 30th and the notice of appeal was not filed until May 19th. Michael Yoder thus delayed his appeal beyond the normal deadline of April 9th and beyond the time to which his time for appeal could have been extended under Fed.R.App.P. rule 4(b). He contends that a certain written inquiry to me dated April 21st should be construed as his notice of appeal and I sua sponte have a question whether the order denying suppression was an appealable order in view of my omission to make "essential findings on the record" as required by Fed.R.Crim.P. rule 12(e). These

DISTRICT COURT'S MEMORANDUM & ORDER

are matters for resolution by the United States Court of
Appeals for this Circuit.

Dated: Buffalo, N.Y.
June 17, 1977

St. John V. Echen
U.S.D.J.

DEFENDANT'S EXHIBIT 1

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

AFFIDAVIT
Indictment No. Cr. 76-174

MICHAEL YODER,
Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

MICHAEL YODER, being duly sworn, deposes and states
as follows:

1. My name is MICHAEL YODER, and I am the defendant in the above-captioned matter.
2. I make this statement on the 19th day of November, 1976, in the office of my attorney, MARK J. MAHONEY.
3. On or about the 9th day of November, 1976, I called the office of the Federal Bureau of Investigation in Buffalo, New York, and advised them that I had heard that they were interested in talking with me. They advised me that that was the case and that this was in connection with the robbery of the Strykersville Bank.
4. On the 11th day of November, 1976, at or about 1:00 o'clock in the afternoon I appeared at the local FBI Office on Huron Street in the City of Buffalo. This was Veteran's Day.
5. Here I met agents, Thomas Gray and John Poerstel. These individuals showed me their identification. They told me that they had enough evidence to convict me for the robbery of the Wyoming County Bank in Strykersville, New York, on October 20, 1976. They told me that Brian Buchanan had already given

DEFENDANT'S EXHIBIT 1

them the whole story and that I was implicated. Agent Gray ran through a description of how he thought the robbery had gone, then asked me if I wanted to cooperate.

6. There came a time when I was asked to sign a card in connection with my rights. At this time I asked if I could have a lawyer. I was told by the FBI agents that I could not have a lawyer unless I was either arrested or signed a confession. They told me I hadn't been arrested and that I hadn't signed a confession and so I couldn't have a lawyer. It was after this that I did sign the card which they had given to me and that I signed a statement which they had written out.

7. I have been asked by my attorney, MARK MAHONEY, whether I have discussed the details of my interrogation by the FBI with him ^{M-1 (Brian Buchanan)} or whether he has discussed the details of his interrogation by the FBI with me. My answer is that I have not spoken to Brian Buchanan about my interview nor with him about his interview.

8. I have also been directed by my attorney, MARK MAHONEY, not to talk with Brian Buchanan or anybody else about the details of my interview with the Federal Bureau of Investigation. He advises me that the reason for it is so that certain similarities between the facts of my case and that of Brian Buchanan's will not appear to be the result of some agreement or conspiracy between Brian Buchanan and myself. My attorney has not told me exactly what these similarities are.

Statement given: November 19th, 1976

Statement dictated: November 19th, 1976

Statement transcribed: November 29th, 1976

Date signed

Jan 3 1977 Michael R Yorder

DEFENDANT'S EXHIBIT 1

Sworn to before me this
3rd day of January, 1977.

Rita J. Carter

RITA J. CARTER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place Buffalo N.Y.
 Date 11/11/76
 Time 1:03 PM

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Michael R. Updegraff

Witness: James A. [unclear], Special Agent FBI, Buffalo, N.Y. 11/11/76

Witness: [unclear], Special Agent, F.B.I. Buffalo N.Y. 11/11/76

Time: 1:07 PM

(a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(c) Duration and substitution of appointments.—A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

PLAN FOR THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK PURSUANT TO
THE CRIMINAL JUSTICE ACT OF 1964, AS AMENDED

TITLE II Determination of Need of Counsel

* * *

B. Counsel for Person Arrested When Representation
is Required by Law.

Where a person arrested has been represented by counsel before his presentation before a judicial officer under circumstances where such representation is required by law, his counsel may subsequently apply to the magistrate or judge for approval of compensation. If such application is made to a magistrate, the magistrate shall submit his recommendation to a judge for final approval. If the court or magistrate finds such person has been and is then financially unable to obtain an adequate defense, and that such representation was required by law, compensation will be made retroactive to cover out-of-court time expended by the attorney during the arrest period, and in addition cover compensation for services rendered from the time of his initial presentation before a magistrate, or the court, as the case may be. If the person represented is unavailable at the time counsel applies to the court for approval of compensation for services rendered during the arrest period, the attorney may nevertheless submit his claim for approval based on the arrestee's financial condition and a showing that such representation was required by law.

GUIDELINES FOR THE ADMINISTRATION
OF THE CRIMINAL JUSTICE ACT OF 1964

Chapter 2

APPOINTMENT AND PAYMENT OF COUNSEL

Section 1 Eligibility for Representation Under the Act

2.01 District Plans

* * *

- D. Other cases or proceedings which may be covered or compensable under the Act include, but are not limited to:

* * *

2. Counsel for a witness before a grand jury in cases in which the witness faces loss of liberty. An appointment under subparagraph 1 or 2 shall be deemed to be an appointment under the general terms of the Act rather than under Subsection (g). Such appointment should be considered an appointment in a misdemeanor case for purposes of compensation under the Act.
3. Counsel may be appointed for financially eligible persons proposed by the U. S. Attorney for processing under a "pretrial diversion" program. Such an appointment is deemed to be under the general terms of the Act rather than Subsection (g), and should be considered an appointment in a felony or misdemeanor case in accordance with the offense alleged by the U. S. Attorney to have been violated.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

DANIEL YODER, et al.,

MICHAEL YODER

Defendant.

CR 76-174

INDEX TO RECORD ON APPEAL

1. Indictment.
2. Warrant for arrest of Daniel Yoder.
3. Daniel Yoder's Motion to Suppress.
4. Michael Yoder's Motion to Suppress.
5. Government's Motion for Rehearing and in the alternative for an Order setting forth essential findings of facts and law.
6. Government's Affidavit in support of Motion for Rehearing, etc.
7. Judgment and Commitment Order for Michael Yoder, 3-28-77.
8. Michael Yoder's Notice of Appeal, 4-21-77.
9. Government's Notice of Appeal, 6-23-77.
10. Government's Certificate on Appeal, 6-23-77.
11. Transcript of proceedings before Magistrate, 11-18-76.
12. Transcript of Hearing on Motion to Suppress, 1-3-77, 1-7-77, 1-18-77, and 1-19-77.
13. Transcript of Argument on Motion to Suppress, 1-31-77.
14. Transcript of proceedings relative to pleas of Michael Yoder and Brian Buchanan, 2-3-77.
15. Transcript of plea of Brian Buchanan, 3-21-77.
16. Transcript of plea of Michael Yoder, 3-28-77.
17. Decision and Order on Motion to Suppress, 6-20-77.
18. Letter to the Hon. John T. Elfvin, U.S. District Court Judge, from Mark J. Mahoney, Esq. re appeal Daniel Yoder, Michael Yoder, dated 4-21-77.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

Docket No. 77-1263

MICHAEL R. YODER,

Defendant-Appellant

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

MARK J. MAHONEY, being duly sworn deposes and says:

1. I am not a party to the action, am over 18 years of age and reside at the City of Buffalo, County of Erie and State of New York.

2. On July 22, 1977, I served two (2) copies of the Appellant's brief and appendix in this action, by delivering same to the United States Attorney's Office at 68 Court Street, Buffalo, New York.

Mark J. Mahoney

Sworn to before me this
22nd day of July, 1977.

Rita J. Carter

RITA J. CARTER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

